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No. 07-686

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICARDO VILLEGAS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 26, 2007

QUESTIONS PRESENTED

1. Can probable cause for a warrantless entry into a home and a warrantless arrest be established under the "shared knowledge" doctrine of *Illinois v. Andreas*, 463 U.S. 765 (1983), where the officer making the arrest is not part of the team investigating the offense and has not been told the facts on which probable cause is alleged to be based?

2. In *New York v. Harris*, 495 U.S. 14 (1990), this Court held that, where the police had probable cause to make an arrest and they arrest the defendant in his home without a warrant, the Fourth Amendment exclusionary rule does not apply to subsequent statements made by the defendant while in custody. Should that rule be extended to cases where the police entered the home without probable cause and without a warrant and only obtain probable cause for an arrest after making the warrantless entry?

3. Is the interior hallway of a two-family home, which is normally kept locked and is not open to the public, an area in which a person can have no Fourth Amendment expectation of privacy?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ricardo Villegas respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this matter.

OPINIONS BELOW

The district court's oral opinion denying Mr. Villegas's motion to suppress, Pet. App. 26a-41a, held that, because Mr. Villegas had been arrested in the shared hallway of a two-family home, he had no Fourth Amendment expectation of privacy and was properly arrested without a warrant. On July 27, 2007, the United States Court of Appeals for the Seventh Circuit issued its opinion affirming Mr. Villegas's conviction. On the question whether Mr. Villegas had a legitimate expectation of privacy in the area where he was arrested, two members of the panel held that he had none. Further, relying on *New York v. Harris*, 495 U.S. 14 (1990), the panel alternatively held that, even if there were a Fourth Amendment violation, the exclusionary rule did not apply to Mr. Villegas's post arrest statements because there was probable cause for his arrest. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 495 F.3d 761 (7th Cir. 2007) and is reprinted at pages 1a-24a of the Petitioner's Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its decision on July 27, 2007. The Court denied a timely petition for rehearing with suggestion for rehearing en banc on August 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Milwaukee Police Officer Michael Lutz arrested Mr. Villegas on August 20, 2004 in the hallway of the house where he lived. Officer Lutz did not have a warrant either for Mr. Villegas's arrest or to enter his home.

Earlier that day, Milwaukee Police Officer Thomas Obregon had seen two men outside the house. He recognized one of them as Ephraín Muñoz, whom the Milwaukee Police wanted to question in connection with a homicide investigation.

Officer Obregon called for backup. Several officers responded, including Officer Lutz, but by the time they arrived, Muñoz and the other man – who was Mr. Villegas – had gone into the house. The officers surrounded the house and waited.

Officer Lutz took up a position by the front door. He heard officers at the rear yelling that someone was trying to leave. A few moments later, Officer Lutz heard the officers yell that the person was going back into the house.

At that point, Officer Lutz opened the house's front door, which was apparently unlocked, and stepped into the hallway. At the same moment, Mr. Villegas opened the kitchen door and stepped into the hallway as well. Officer Lutz identified himself as a law officer and stated that he was placing Mr. Villegas under arrest.

Officer Lutz testified that he then saw Mr. Villegas drop a plastic baggie containing what was later determined to be marijuana.

Mr. Villegas turned to reenter the kitchen. Officer Lutz grabbed him. They struggled. After other officers arrived, Mr. Villegas was subdued and taken into custody.

The house in which Mr. Villegas was arrested was a two-story building owned by Mr. Villegas's sister. Mr. Villegas and his sister lived on the first floor. The second floor was rented to another family.

The house's front door leads to a hallway from which either apartment can be entered. The front door is normally kept locked, and the hallway is not open to outsiders. To obtain entrance, visitors must ring a doorbell located outside the house and obtain permission from a resident. The mail boxes for both apartments are also located outside. The record is silent as to why, at the particular moment Officer Lutz entered, the front door was unlocked.

After his arrest, Mr. Villegas was taken to the Milwaukee County Jail. A day or two later, Special Agent Ronald Rickey of the Bureau of Immigration

and Customs Enforcement ("ICE") learned that Mr. Villegas was being held. Agent Rickey went to the jail to question him.

During the questioning, Mr. Villegas stated that he was a citizen of El Salvador and that he had previously been deported from the United States on two occasions. Mr. Villegas stated that he was not a United States citizen. Agent Rickey then showed Mr. Villegas a photograph from an immigration file, and Mr. Villegas identified the person in it as himself.

After Agent Rickey established that Mr. Villegas was the person in the file, he charged Mr. Villegas with violating 8 U.S.C. § 1326(b)(2), which makes it a criminal offense for a person previously deported as an aggravated felon to reenter the United States without permission. Mr. Villegas was also charged with possessing marijuana.

Mr. Villegas moved to suppress the identification by Agent Rickey as the fruit of an improper warrantless entry and arrest. After an evidentiary hearing, the Magistrate Judge found that Officer Lutz's actions were justified by the hot pursuit exception to the warrant requirement. Mr. Villegas timely objected to that finding.

The district court held a *de novo* hearing on the motion to suppress, combined with a bench trial on the two offenses. The district court denied the motion to suppress and convicted Mr. Villegas on both the illegal reentry and marijuana charges.

In denying the motion to suppress, the district court did not adopt the "hot pursuit" rationale. Instead, it held that no warrant was required to enter the house because the hallway was a shared area in which Mr. Villegas had no reasonable expectation of privacy.[1] Pet. App. 33a-34a.

Several days after the trial, the Government moved to set aside the conviction on the marijuana count, stating that one of the officers involved in Mr. Villegas's arrest, who had testified at his trial, had been charged with planting drugs used as evidence in another case. Without expressly ruling on that motion, the district court entered a judgment order convicting Mr. Villegas solely on the illegal reentry charge and sentencing him to 80 months in prison.

Mr. Villegas appealed to the United States Court of Appeals for the Seventh Circuit. A panel of that court affirmed Mr. Villegas's conviction on alternative grounds.

First, a majority held that Mr. Villegas had no legitimate expectation of privacy in the hallway where he was arrested. Pet. App. 15a-16a. One judge declined to join that holding, finding it "conceptually problematic" where – as here – the

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[1] The district court further held that this Court's decision in *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), compelled the conclusion that evidence of a person's identity can never be suppressed. Pet. App. 37a. The Seventh Circuit did not reach that issue.

hallway was not open to the public and the permission of at least one resident was required for entry. Pet. App. 21a-22a (Rovner, J., concurring in part and concurring in the judgment).

Second, following *New York v. Harris*, 495 U.S. 14, 18-19 (1990), the panel held that even if the police did violate Mr. Villegas's Fourth Amendment rights, the exclusionary rule does not require the suppression of statements Mr. Villegas made to Agent Rickey while in custody after an arrest upon probable cause.

The district court had not made an express determination that Officer Lutz had probable cause to arrest Mr. Villegas before entering the house. But the Seventh Circuit itself canvassed the record and held that Officer Lutz had probable cause based on information he had received from a fellow officer. Pet. App. 18a-19a.

The information the Seventh Circuit cited was a statement that Officer Obregon made "at some point" to Officer Lutz that Mr. Villegas was a previously deported aggravated felon and that he was subject to an ICE "apprehension request." Pet. App. 4a. The Seventh Circuit characterized that information as "trustworthy information from a reliable source." Pet. App. 18a. But what Officer Obregon actually "knew" at that time consisted of two things:

(1) He had been told by a Detective Fyfe that Mr. Villegas was a previously deported

aggravated felon. This Detective Fyfe did not testify, so the Government did not establish what facts he knew at the time.

(2) He had run Mr. Villegas's name through the National Crime Information Center ("N.C.I.C.") system and had obtained a match. The Government did not place the N.C.I.C. run-off into evidence.

Thus, at the time Officer Lutz entered the house and made the arrest, neither he nor Officer Obregon actually knew whether Mr. Villegas had legally entered the United States, and the N.C.I.C. record expressly contradicts the notion that they were authorized to arrest him without first obtaining that additional information.

Alternatively, Seventh Circuit held that Officer Lutz had probable cause to arrest Mr. Villegas based on the post-entry marijuana drop and Mr. Villegas's struggle with the arresting officers. Pet. App. 19a n.4.

REASONS FOR GRANTING THE WRIT

This Court should review the decision below for three reasons.

First, the Seventh Circuit's determination that there was probable cause to enter Mr. Villegas's home and arrest him necessarily depends on an interpretation of the "shared knowledge" doctrine that places the Seventh Circuit in conflict with the decisions of other circuits. Here, Officer Lutz had no

direct knowledge of Mr. Villegas's background, nor had he taken part in any investigation of Mr. Villegas. But the Seventh Circuit found that Officer Lutz had probable cause to enter Mr. Villegas's home and make the arrest based on "trustworthy information" he had received from Officer Obregon, a "reliable source." Pet. App. 18a.

This Court has held that, "where law enforcement authorities are cooperating in an investigation, as here, the knowledge of one is presumed shared by all." *Illinois v. Andreas*, 463 U.S. 765, 771 n.5 (1983). But the courts of appeals applying that rule have split over whether the presumption of shared knowledge encompasses the aggregate of all information the authorities possess or whether there must be some actual communication of information among the officers involved in an investigation. *See, e.g., Bailey v. Newland*, 263 F.3d 1022, 1031-32 (9th Cir. 2001) (noting the split of authority); *United States v. Shareef*, 100 F.3d 1491, 1503-04 (10th Cir. 1996) (same).

Here, Officer Lutz relied on Officer Obregon, who relied on a Detective Fyfe and an N.C.I.C. "runoff." But Detective Fyfe did not testify, nor was the N.C.I.C. document offered in evidence. Yet the Seventh Circuit found no barrier to imputing their unknown and untested information to Officer Obregon and then to Officer Lutz. The Court should clarify the degree of factual communication among law enforcement officers needed to establish probable

cause when the searching and arresting officer does not himself have sufficient knowledge.

Second, to the extent the Seventh Circuit's decision relied on its alternative finding of probable cause established by the marijuana drop and Mr. Villegas's struggle with the police, it extended the holding of this Court's decision in *New York v. Harris* far beyond its rationale. In *Harris*, this Court held that statements made by a prisoner while in custody following a warrantless arrest need not be suppressed so long as the police had probable cause to make the arrest *before* they entered the arrestee's home. 495 U.S. at 21. But when the police enter a home without a warrant or probable cause and only obtain probable cause after entering, suppressing a defendant's post-arrest statements serves the Fourth Amendment exclusionary rule's purpose of deterring improper police actions.

Third, this Court should resolve a split among the circuits over the test for determining the existence of a reasonable expectation of privacy under the Fourth Amendment. The Seventh Circuit took the view that, so long as access to an area of two-family residence is controlled by both families, a resident can have no expectation of privacy while in that area.

This case provides an excellent opportunity to clarify and harmonize a variety of approaches taken by the courts of appeals to determining tenants' reasonable expectations of privacy in secured "common areas" of small multi-resident dwellings.

Compare, e.g., United States v. Heath, 259 F.3d 522, 533-34 (6th Cir. 2001) (resident of a multi-unit apartment building has a protected Fourth Amendment privacy interest in common areas of locked apartment building) *with United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993) (resident of a multi-unit apartment building has no protected Fourth Amendment interest in common areas, locked or not). *Compare also, e.g., United States v. King*, 227 F.3d 732, 749-50 (6th Cir. 2000) (resident of a duplex has a heightened Fourth Amendment privacy interest in common areas) *with United States v. Holland*, 755 F.2d 253, 256-57 (2d Cir. 1985) (resident of a duplex has no Fourth Amendment expectation of privacy in common areas).

In addition, granting certiorari in this case would permit this Court to harmonize the lower courts' divergent approaches to Fourth Amendment privacy interests in shared residential spaces with this Court's established approach to shared workplaces. *See, e.g., Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) (an employee has a protected Fourth Amendment privacy interest in his office even though the office was one large room shared with other employees).

I. This Court Should Resolve a Split Among the Circuits Over the Extent to Which the "Shared Knowledge" Doctrine Can Establish Probable Cause.

The linchpin of the decision below is that Officer Lutz had probable cause to arrest Mr.

Villegas before he entered the home. In reaching that conclusion, the Seventh Circuit held that Officer Lutz obtained "trustworthy information from a reliable source" – Officer Obregon. Pet. App. 18a.

Officer Lutz had no reason to distrust a fellow officer. But trust is not the issue. If probable cause is based on what Officer Obregon told Officer Lutz, then the principles of the "shared knowledge" doctrine must apply, because Officer Lutz himself knew nothing that would establish probable cause. *See Andreas*, 463 U.S. at 771 n.5 (if several cooperating officers possess information that, taken together, adds up to probable cause, an arrest can satisfy the Fourth Amendment because "the knowledge of one is presumed shared by all").

The courts of appeals have split on the degree of connection or communication individual officers must have before their knowledge can be, in the words of *Andreas*, "presumed shared by all." As the Ninth Circuit has observed, "the Supreme Court has not addressed whether there must be a communication between the officers to support this presumption." *Bailey*, 263 F.3d at 1031. The courts of appeals have adopted varying approaches.

On the one hand, some circuits simply aggregate the knowledge of all officers. The Sixth Circuit has held that probable cause can be established by "the collective knowledge of the police." *Collins v. Nagle*, 892 F.2d 489, 495 (6th Cir. 1989). Similarly, the Fifth Circuit has held that, at least where the officers are working together on an

investigation, the "laminated total" of their knowledge can establish probable cause. *United States v. Lee*, 962 F.2d 430, 436 (5th Cir. 1992).

On the other hand, some circuits require "actual communication to the arresting officer of either facts or a conclusion constituting probable cause." *Shareef*, 100 F.3d at 1053 (10th Circuit); *accord United States v. Gillette*, 245 F.3d 1032, 1034 (8th Cir. 2001) (collective knowledge of officers involved in an investigation will support probable cause if "some degree of communication exists between them").

The Ninth Circuit has split internally. In *United States v. Del Vizo*, 918 F.2d 821, 826 (9th Cir. 1990), the court held that probable cause can be based on officers' collective knowledge "[w]hen there has been communication among agents." But in *United States v. Bertrand*, 926 F.2d 838, 844 (9th Cir. 1991), the court held that the shared knowledge doctrine applies "regardless of whether [the] information was actually communicated" to the arresting officer.

Finally, the Seventh Circuit also has taken inconsistent approaches, even in the same case. In *United States v. Edwards*, 885 F.2d 377, 382 (7th Cir. 1989), the court held that "[a] supervising officer's knowledge about a defendant cannot be relied upon to provide probable cause for his arrest where there is no evidence that such knowledge was communicated to the agents on the scene who actually made or ordered the defendant's arrest."

But where two officers make an arrest together, their knowledge is imputed to each other without any communication. *Id.* at 382-83; *see also United States v. Garcia Parra*, 402 F.3d 752, 766 (7th Cir. 2005) (where a team of officers "worked together closely" in the investigation, their collective knowledge may be "mutually imputed even when there is no express testimony that the specific or detailed information creating the justification for a stop was conveyed").

Here, the Seventh Circuit appears to have created yet another approach, based entirely on whether Officer Lutz regarded Officer Obregon as "trustworthy" and "reliable." The court pointed to a brief communication from Officer Obregon to Officer Lutz, but Officer Obregon was not Officer Lutz's supervisor, nor did he direct Officer Lutz to arrest Mr. Villegas. At most, he told Officer Lutz that Mr. Villegas was wanted by ICE. But when Agent Rickey of ICE produced a copy of a 2002 N.C.I.C. record for Mr. Villegas, he could not identify it as the same one Officer Obregon saw two years later. Agent Rickey did testify, however, that the N.C.I.C. record in his possession was not an open request for Mr. Villegas's arrest.

Where the arresting officer makes an arrest at the request of a fellow officer, the arrest violates the Fourth Amendment if it turns out the fellow officer lacked a factual basis for probable cause. *Whiteley v. Warden*, 401 U.S. 560, 568 (1971). If the requesting officer does not have adequate information, "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Id.*; *cf.*

United States v. Hensley, 469 U.S. 221, 232 (1985) (an officer's reliance on information provided by other police officers will justify a *Terry* stop only if the information consists of "articulable facts supporting a reasonable suspicion that the wanted person has committed an offense).

Any other rule would eviscerate the probable cause requirement. The police could then dispense with evidence or informants and simply rely on each other in good faith as fellow officers.

Thus, Officer Lutz's justification for entering Mr. Villegas's home without a warrant was only as good as the justification Officer Obregon may have had. But the record here fails to establish that Officer Obregon had actual information adequate to establish probable cause to arrest Mr. Villegas as a previously deported felon who had reentered the United States without permission, in violation of 8 U.S.C. § 1326(b)(2). According to his own testimony:

(1) Officer Obregon was told by a Detective Fyfe that Mr. Villegas was a previously deported aggravated felon.

(2) Officer Obregon had run Mr. Villegas's name "through N.C.I.C.," and it "came up on a run off."

Detective Fyfe never testified, so there was no evidence that his statement was based on reliable information. He is one more police officer in a chain that did not lead back to actual facts. Nor was the N.C.I.C. "run off" introduced into evidence, so there

is no way to know whether it provided information sufficient to justify entering Mr. Villegas's home and arresting him.

Imputing collective knowledge must have limits. Confining imputation to the actual team conducting an investigation avoids incentives for the police to make arrests in the hope that a *post facto* canvass of all officers and records anywhere might add up to probable cause. Officer Lutz may have believed in good faith that Officer Obregon knew the facts, and Officer Obregon may have believed in good faith that Detective Fyfe and N.C.I.C. knew the facts. But neither the district court nor the Seventh Circuit learned what those facts were. This Court should grant certiorari to decide the extent to which the information possessed but not communicated by Detective Fyfe can be attributed to Officer Lutz to establish that there was probable cause to arrest Mr. Villegas before Officer Lutz entered his home and arrested him.

II. The Holding of *New York v. Harris* Should Not Be Extended to Cases Where the Police Enter a Home Without a Warrant and Without Probable Cause.

In *New York v. Harris*, 495 U.S. 14 (1990), the police entered the defendant's home without a warrant, arrested him, and took him to the station house. 495 U.S. at 15-16. When at the station, the defendant signed a confession. *Id.* at 16. The defendant moved to suppress that confession as the

fruit of an impermissible warrantless entry into his home. *Id.*

This Court's analysis acknowledged that, in light of *Payton v. New York*, 445 U.S. 573 (1980), the defendant's arrest in his home without a warrant violated the Fourth Amendment. *Harris*, 495 U.S. at 17. It also held that the police had probable cause to make the arrest before entering the defendant's home. *Id.*; *see also id.* at 15 ("Various facts gave the police probable cause to believe that the respondent in this case, Bernard Harris, had killed Ms. Staton.")

Based on those premises, the Court held that the defendant's post-arrest confession should not be suppressed. As the Court stated, "[b]ecause the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given Miranda warnings, and allowed to talk. . . . Harris' statement taken at the police station was not the product of being in unlawful custody." 495 U.S. at 18-19.

The Court further observed that suppressing the confession would only "minimal[ly]" advance the exclusionary rule's deterrent purpose, *id.* at 20, because the police already had probable cause to arrest the defendant and therefore "need not violate *Payton*" to interrogate him. *Id.* at 20-21.

Notably, the Court recognized that *Harris* was "different" from such cases as *Brown v. Illinois*, 422 U.S. 590 (1975), *Dunaway v. New York*, 442 U.S. 200 (1979), and *Taylor v. Alabama*, 457 U.S. 687 (1982);

in those cases, evidence obtained following a warrantless arrest was suppressed because the police lacked probable cause before making the arrest. *Harris*, 495 U.S. at 18-19.

Given that an alternative ground for the Seventh Circuit's decision was that Mr. Villegas's post-arrest actions established probable cause for his continued detention, this case presents the important issue that *Harris* left undecided: whether exclusionary rule should apply to post-arrest statements where the police did not have probable cause for the arrest *before* they entered the defendant's home without a warrant.

Harris does not support the proposition that the police can enter a home without probable cause, hoping to find a basis on which a person might be arrested that would retroactively sanitize the illegal entry. In such cases, the defendant's post-arrest statements must be suppressed because they are the direct fruit of the Fourth Amendment violation. *Taylor*, 457 U.S. at 694. The Court has flatly rejected the notion that the police can arrest a person without probable cause "in the hope that something would turn up." *Id.* at 691. *See also Minnesota v. Olson*, 495 U.S. 91, 94-95 (1990) (affirming suppression of post-arrest statement where the warrantless arrest violated the defendant's Fourth Amendment expectation of privacy).

Applying *Harris* here would embolden the police to enter homes without warrants in the hope

that "something would turn up." Worse, it would encourage police to manufacture or plant evidence to justify the warrantless entry and to sustain any subsequent confession. That is not mere hyperbole. It is well worth remembering that Mr. Villegas's marijuana conviction was dropped after the trial because one of the arresting officers was found to have planted drugs in another case.

This Court should therefore grant a writ of certiorari to address whether *Harris* can be applied where the police did *not* have probable cause before they entered a home and made an arrest without a warrant.

III. This Court Should Resolve a Split Among the Circuits and Clarify the Standard for Determining When a Person Has a Fourth Amendment Privacy Interest in Areas Not Under His or Her Exclusive Legal Control.

The Seventh Circuit, concurring with several other circuits, held that an area jointly controlled by the residents of a two-family home can never be private enough to create a protectible Fourth Amendment privacy interest. Pet. App. 12a. That holding conflicts with decisions of at least one other circuit. *See, e.g., United States v. Heath*, 259 F.3d 522, 533-34 (6th Cir. 2001). It also fails to incorporate this Court's own Fourth Amendment jurisprudence involving shared areas, which establishes that a person can have a protected privacy interest in areas that the person does not own or exclusively control. *See, e.g., Mancusi v.*

DeForte, 393 U.S. 364, 368-69 (1968) (holding that an employee has a Fourth Amendment privacy interest in an open office that he shares with other employees).

The courts of appeals that have considered this issue have split along several lines. The Seventh Circuit itself – as demonstrated by this case – takes the absolutist view that a person can have no protected Fourth Amendment interest in any residence area "common" to more than one family unit. *See also United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) ("We think the district court [was] on solid ground in holding that a tenant has no reasonable expectation of privacy in the common areas of an apartment building.").

On the other hand, the Sixth Circuit has held residents of multi-unit apartment buildings have a protected Fourth Amendment expectation of privacy in the building's hallways where the entrance door is typically kept locked and was not open to the public. *United States v. Carriger*, 541 F.2d 545, 550-51 (6th Cir. 1976); *see also Heath*, 259 F.3d at 533-34 (reaffirming *Carriger*). In *United States v. Dillard*, 438 F.3d 675, 683-84 (6th Cir. 2006), however, the Sixth Circuit held that a resident of a multi-unit building has no expectation of privacy in common areas where the front door was kept unlocked.

The Eleventh Circuit has held that a resident of a large, high-rise apartment building has no reasonable expectation of privacy in common areas where front door had a lock that was "not

functioning" at the time the police entered. *United States v. Miravalles*, 280 F.3d 1328, 1329 (11th Cir. 2002). The court left open the possibility that it would find a protected Fourth Amendment interest if the lock had been operational. *Id.*

The Second, Eighth, and Ninth Circuits do not distinguish between locked and unlocked doors, holding that a resident of a multi-unit apartment building has no protected Fourth Amendment privacy interest in the hallways even when the front door is kept locked. *United States v. Barrios-Moreira*, 872 F.2d 12, 14-15 (2d Cir. 1989); *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977); *Nohara*, 3 F.3d at 1242 (9th Circuit).

Finally, consistent with their views regarding larger apartment buildings, the Sixth Circuit has held that there is a heightened expectation of privacy in two-family houses, *King*, 227 F.3d at 749-50, while the Second Circuit has rejected the notion that two-family homes are analytically different from large apartment buildings. *Holland*, 755 F.2d at 256-57.

Throughout those cases, the courts of appeals have struggled to harmonize the concept of Fourth Amendment "privacy" with the concept of shared control over certain premises. In *Katz v. United States*, 389 U.S. 347 (1967), the Court held that "privacy" for Fourth Amendment purposes often has "nothing to do with privacy" as a concept defined by property law. 389 U.S. at 350. Thus, "'the premise that property interests control the right of the Government to search and seize has been

discredited.'" *Id.* at 353, *quoting Warden v. Hayden*, 387 U.S. 294, 304 (1967).

Justice Scalia's concurring opinion in *O'Connor v. Ortega*, 480 U.S. 709 (1987) observed that "[i]t is privacy that is protected by the Fourth Amendment, not solitude." *Id.* at 730 (Scalia, J., concurring). This Court has recognized, as several circuits have not, that exposing oneself to a defined and limited group of people is not a total surrender of one's privacy interests to the world at large. For example, in *Minnesota v. Olson*, 495 U.S. 91 (1990), the Court held that an overnight houseguest has a protected expectation of privacy in his host's home. 495 U.S. at 98. The houseguest neither owns nor controls access to the house, and he is subject to the host's superior rights of access. But, as the Court held, that did not undercut the guest's Fourth Amendment protection. *Id.* at 99.

The same principles governed the Court's recent decision in *Georgia v. Randolph*, 547 U.S. 103 (2006), which held that a resident is entitled to assert his Fourth Amendment privacy interest in a residence even where a co-resident has the legal right to invite strangers unwelcome to him and in fact does so. *Id.* at 106. There, when the police knocked on the door without a warrant, the defendant refused them permission to enter. *Id.* at 107. But his wife granted permission, which she had the legal right to do. *Id.* Although each spouse had legal authority to invite anyone inside, the Court held that the evidence collected during the warrantless search must be suppressed. *Id.* at 122-

23. As the Court reasoned, "customary social understanding" governs the outcome, not a rights-based approach built on one co-tenant's authority to invite anyone to enter. *Id.* at 121.

Here, *no one* gave Officer Lutz permission to enter. The Government did not claim that the upstairs tenants allowed him in. He simply barged in, not content to wait for Mr. Villegas or his friend, Muñoz (the stake-out's original target), to exit.

The Seventh Circuit's decision therefore did not rest on any co-tenant's actual exercise of control over the commonly controlled hallway. Rather, it rested on the notion that the hallway was a true commons – a space open to "the world" because it was not under Mr. Villegas's exclusive control and because the front door happened to be unlocked at the moment Officer Lutz entered. Pet. App. 12a-13a, *citing, e.g., United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991).

Those rationales do not bear scrutiny. First, there was no evidence that the door's being unlocked on the day in question was anything other than an accident.[2] Certainly the record contains no evidence that Mr. Villegas had left it unlocked or that he even

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[2] The Seventh Circuit noted that the upstairs tenants ran a doll clothing business from their apartment, and it speculated that the door was left open so that customers could enter. Pet. App. 12a. That *was* mere speculation and finds no support in the record. To the contrary, the testimony was that the tenants did not invite customers to enter from the street and that they sold their wares to stores and at open-air markets.

knew it was unlocked. Unless he did, there was no basis for the Seventh Circuit to conclude that he had abandoned any privacy interests.

Further, the hallway was open to the upstairs tenants, but only to them. It was not like the lobby of a large apartment building into which strangers could wander. There was no one stationed at the door who had independent authority to admit strangers. Even the mail carrier left the mail outside and did not have access to the hall.

Thus, the hallway was subject to overlapping control, like the houses in *Randolph* and *Olson*. While Mr. Villegas had, in effect, ceded a limited degree of his privacy to the upstairs tenants, it was only to them. He had the reasonable expectation that no one else could or would enter the building without express permission. Nor would any member of the public expect to obtain access without express permission. As the concurring judge framed the reason why she could not join the majority on this issue: "the relevant question, it seems to me, is not whether the hallway is accessible to other residents and their invitees, but whether the hallway is accessible to the public at large." Pet. App. 21a (Rovner, J., concurring in part and concurring in the judgment). In other words:

> We do not say that cohabiting adults have no reasonable expectation of privacy in their shared residence although both have access to some if not all if the premises and either one may admit others; rather, we recognize that

> each has a cognizable privacy interest for Fourth Amendment purposes and that a police officer normally cannot enter without the consent of at least one resident.

Pet. App. 22a.

The Seventh Circuit's analysis of privacy in the home, along with that of its concurring circuits, also cannot be reconciled with this Court's analysis of Fourth Amendment privacy interests in the workplace. In *Mancusi v. DeForte*, 392 U.S. 364 (1968), the defendant's office was "one large room, which he shared with several other union officials." *Id.* at 368. In holding that the defendant the Fourth Amendment applied to a search of that office, the Court held that, although the defendant shared his office space with others, he "still could reasonably have expected that only those persons and their personal or business guests would enter the office and that records would not be touched except with their permission or that of union higher-ups." *Id.* at 369. Moreover, the Court observed it was irrelevant that the employer and the defendant's office mates had the power to consent to the search, because no consent was given. *Id.*; *see also O'Connor*, 480 U.S. at 717 (citing *Mancusi* with approval); *id.*, 480 U.S. at 730 (Scalia, J., concurring) (same). The same principles apply even more strongly here, where the warrantless intrusion was into a home, the Fourth Amendment's core concern.

This area of Fourth Amendment jurisprudence is ripe for unification. *See* Sean M. Lewis, Note, *The*

Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings? 101 MICH. L. REV. 273, 310 (2002) (arguing for "a resolution of the deep circuit split in this area"). The Court should grant certiorari to provide the needed clarity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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